(8)

No. 88-1847

In The

Supreme Court of the United States

October Term, 1990

FORD MOTOR CREDIT COMPANY,

Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,

Appellee.

On Appeal From The District Court Of Appeal Of Florida, First District

BRIEF OF AMICI CURIAE, CATERPILLAR INC., CLARK EQUIPMENT COMPANY, CHASE MANHATTAN LEASING COMPANY (MICHIGAN), INC., GENERAL MOTORS ACCEPTANCE CORPORATION, and GENERAL MOTORS CORPORATION in Support of Appellant

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QUESTIONS PRESENTED

Appellant, Ford Motor Credit Company, has appealed a decision of the District Court of Appeal of Florida, First District, which held that Florida's intangible property tax does not discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution. Appellant has appealed this decision and raised the following federal questions related to Florida's intangible tax system:

1. Whether this Court's "internal consistency" test – designed to detect state taxes that violate the Commerce Clause by exposing interstate commerce to a discriminatory risk of multiple taxation – applies in the case of a tax on intangible property?

2. Whether a tax on intangible property fails the "internal consistency" test if, as a result of its enactment by every state, an interstate business would pay multiple taxes on the full value of its intangible property while an exclusively intrastate competitor would pay only a single tax to its state of domicile?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

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CONSENT OF THE PARTIES

Both Ford Motor Credit Company, Appellant, and the State of Florida, Department of Revenue, Appellee, have consented to the filing of this brief. Their consents have been filed with this Court.

INTERESTS OF AMICI CURIAE

Caterpillar Inc. ("Caterpillar") is a Delaware corporation with its principal place of business in Peoria, Illinois. It is a multinational company which is engaged in the design, manufacture and sale of earthmoving, construction, and material handling equipment. Caterpillar engages in these business activities in numerous countries and states, including Florida. In the course of such activities, Caterpillar sells its equipment on open account and thereby creates intangible assets used in interstate commerce. As a result, Florida has subjected Caterpillar to its tax on intangibles, and Caterpillar's tax liability to the State of Florida will be directly affected by the outcome of this appeal.

Clark Equipment Company ("Clark") is a Delaware corporation with its principal place of business in South Bend, Indiana. It is a multinational company engaged in the design, manufacture and sale of equipment to move materials, systems to transfer power, and products for industrial application. Clark engages in these activities in numerous foreign countries and states, including Florida. In the course of such activities, Clark finances certain purchases and therefore creates various intangible assets used in interstate commerce. As a result, Florida has subjected Clark to its tax on intangibles, and its tax liability to the State of Florida will be directly affected by the outcome of this appeal.

Chase Manhattan Leasing Company (Michigan), Inc. ("Chase Manhattan") is a Michigan corporation with its principal place of business in Buchanan, Michigan. It is engaged in the financing of wholesale and retail sales of equipment in numerous states, including Florida. These

activities result in the creation of various types of intangible assets used in interstate commerce. Accordingly, Florida has subjected Chase Manhattan to its tax on intangibles, and Chase Manhattan's tax liability to the State of Florida will be directly affected by the outcome of this appeal.

General Motors Acceptance Corporation ("GMAC"), a wholly owned subsidiary of General Motors Corporation, is a New York corporation with its principal place of business in Detroit, Michigan. It is engaged in the financing of wholesale and retail sales of vehicles manufactured by General Motors Corporation in numerous states, including Florida. These activities result in the creation of intangible assets used in interstate commerce. Accordingly, Florida has subjected GMAC to its tax on intangibles. GMAC is currently litigating the imposition of this tax in *General Motors Acceptance Corp. v. Comptroller and Dept. of Revenue, State of Florida*, Case No. 86-2526 (Fla. 2d Cir. Ct.), and the issues now before this Court have been raised in that litigation. As a result, the outcome of this proceeding will affect GMAC's pending litigation.

General Motors Corporation ("GM") is a Delaware corporation which maintains its principal place of business in Detroit, Michigan. It is a multinational company engaged in the design, manufacture and sale of vehicles. GM engages in these business activities in numerous countries and states, including Florida. In the course of such activities, GM engages in various types of financing activities. These business activities result in the creation of intangible assets used in interstate commerce. As a result, Florida has subjected GM to its tax on intangibles, and its tax liability to Florida will be directly affected by the outcome of this appeal.

Amici Curiae are extensively engaged in interstate commerce and are subject to a variety of taxes imposed by numerous states and localities. In addition to this particular appeal, Amici Curiae have a strong interest in protecting interstate commerce from discriminatory and unduly burdensome state and local taxation. Specifically, Amici Curiae are subject to taxes based upon their intangible property and are concerned that their intangible property will be subjected to multiple tax burdens. The Court's disposition of this appeal will not only directly affect the pending actions and tax liabilities of Amici Curiae, but will also affect the future development of state and local taxation in a manner which will have a far-reaching, long-term effect on activities engaged in by Amici Curiae.

SUMMARY OF THE ARGUMENT

As a practical matter, the District Court of Appeal of Florida, First District, has created an exemption from the provisions of the Commerce Clause of the United States Constitution for Florida's intangible personal property tax. The Florida court created this exemption by declining to apply the internal consistency test in resolving a Commerce Clause challenge to Florida's intangible personal property tax.

Florida imposes an unapportioned tax on intangible personal property in three separate circumstances: (1) when the owner of the intangible has a Florida domicile; (2) when the sale that gives rise to the intangible is a Florida sale in the ordinary sense of that term; and (3) by creating a conclusive presumption of a Florida sale,

through creation of a deemed "business situs," when a sale results in delivery of the underlying property in Florida. The tax is applied as of January 1st of each year to the outstanding balance of the intangibles.

Unlike the usual ad valorem property tax, Florida's intangible tax is imposed without regard to the current location of the intangible, the current location of the underlying property which was the subject of the sale from which the intangible arose, or the current location of the debtor. Although only the specific activities outlined above are of consequence in subjecting intangibles to the Florida tax, Florida continues to impose the tax each year which the intangible remains outstanding.

If other states adopted Florida's taxing scheme, taxpayers domiciled elsewhere but engaged in interstate commerce in Florida would be subjected to an annual tax on their intangible property in their state of domicile, in the state in which the sale generating the intangible actually occurred, and in any other state in which the property was delivered to the purchaser. Under such circumstances, those taxpayers engaged in interstate commerce would be taxed on 100% of the unit value by as many as three different states.

Taxpayers domiciled in Florida and doing business only in Florida would pay only one tax on the unit value of their intangibles. Accordingly, Florida's taxing scheme impermissibly discriminates against interstate commerce in violation of the Commerce Clause by imposing a greater burden on those engaged in interstate commerce than on those doing business solely within Florida.

ARGUMENT

The issue before this Court is whether Florida's intangible ad valorem tax system violates the Commerce Clause of the United States Constitution. The answer to this question involves a determination of whether the internal consistency test used by this Court to resolve Commerce Clause challenges applies to intangible property created and used in interstate commerce and whether Florida's tax is internally inconsistent.

Florida's First District Court of Appeal ("the Florida court") declined to apply the internal consistency test in analyzing Appellant's Commerce Clause challenge to Florida's intangible personal property tax. *Ford Motor Credit Co. v. Department of Revenue*, 537 So.2d 1011, 1013 (Fla. 1st DCA 1988), *review denied*, 542 So.2d 988 (Fla. 1989).

The internal consistency test is critically important in analyzing Florida's intangible tax because the tax is not limited to intangibles arising from a single discrete event, such as a sale, but rather taxes intangibles based on multiple events, such as domicile, sale, or delivery. As a result, Florida's taxing scheme allows multiple states to impose a tax on a single unit of value, the intangible, without apportionment. If Florida's tax is upheld, any state in which one of several triggering activities occurs could impose a tax on 100% of value of the intangible. If allowed to stand, the decision below, and similar decisions by other state courts, will substantially curtail this Court's establishment of a consistent and rational analysis which can be used to determine whether a state tax impermissibly burdens or discriminates against interstate commerce.

A refusal by state courts to utilize the internal consistency test in resolving Commerce Clause challenges to state taxation will have a material and adverse impact on taxpayers engaged in interstate commerce. The constant need of the various states for new revenues, the evolving complexity of their taxing schemes, and the extent of modern day interstate commerce combine to heighten the severity of such an adverse impact.

I. FLORIDA'S INTANGIBLE PERSONAL PROPERTY TAX DIRECTLY IMPACTS INTERSTATE COMMERCE.

The Florida court, while acknowledging that discrimination against interstate commerce is prohibited, refused to apply the internal consistency test in its analysis of Florida's tax and found that Florida's taxing scheme did not violate the Commerce Clause. *Id.* at 1013. Although the Florida court stated that its refusal to apply the internal consistency test was based on a distinction between property taxes and excise and income taxes, its holding is also based on a finding that interstate commerce is not involved. The Florida court found that "[t]he contested intangible tax in the present case is not integrally related to interstate commerce . . . " *Id.* at 1012. In reaching this conclusion, the Florida court failed to address the interstate nature of the intangibles which Florida taxes.

Florida's intangible tax is imposed in three separate circumstances: (1) when the owner of the intangible has a Florida domicile;[1] (2) when the sale which gives rise to

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[1] *See Ford Motor Credit*, 537 So.2d at 1012, *citing*, *Florida Steel Corp. v. Dickinson*, 328 So.2d 418 (Fla. 1976).

the intangible is a Florida sale; or (3) when the sale which gives rise to the intangible results in a delivery of the property to a purchaser in Florida. Fla. Stat. § 199.112(1) (1983). In this latter circumstance, the Florida scheme creates a presumption of a Florida sale, and thus taxable situs, regardless of where the sale actually occurs.

The imposition of the tax is triggered by any one of these activities and is applied on January 1 of each year to the outstanding balance of such intangibles regardless of their subsequent location. The annual tax, which is imposed without apportionment, may impact interstate commerce for years after the creation of the intangible. Once determined, the taxability of the intangible is not impacted by subsequent changes in the location of the debtor or where the intangible is kept or paid.[2] This type of tax scheme has a substantially greater impact on interstate commerce than a localized real or tangible personal property ad valorem tax on property whose actual tax situs is established on a year-to-year basis or an excise tax based on an exclusive discrete in-state event.

Contrary to the Florida court's determination, a review of Florida's taxing statute clearly demonstrates that many of the intangibles it taxes are a part of interstate commerce. By utilizing a tax scheme that would establish a tax situs for intangibles in multiple states, Florida acknowledges that such intangibles are not discrete assets physically located in one particular state, but

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[2] *See Allis-Chalmers Credit Corp. v. Department of Revenue*, 456 So.2d 899 (Fla. 1st DCA), *pet. for rev. denied*, 458 So.2d 271 (Fla. 1984).

rather are assets that have various characteristics present in a number of states at the same time.

Furthermore, Florida specifically excludes certain characteristics of intangibles from the determination of the location of the business situs of the intangibles, i.e., "where they are kept, approved as to creation, or paid." Fla. Stat. § 199.112(1) (1983). By taking this approach, Florida seeks to make the domicile of the owner of the intangible, the place of sale, or the location of the purchaser at the time of delivery of property the only relevant factors in determining the tax situs of any resulting intangibles. Thus, every year thereafter, until the intangible is paid in full, the Florida statute hypothecates a Florida situs based on these original activities. The usual ad valorem tax system, unlike Florida's tax scheme, focuses not on where the intangible is created, but rather on the location of the intangible on the date the annual ad valorem tax is imposed. Florida's approach demonstrates that these intangibles are a part of interstate activities and that to establish a tax situs in Florida, a number of characteristics pertinent to determining a physical location of an intangible must be eliminated from consideration in order to achieve the result desired by Florida.

As early as 1938, this Court recognized:

> The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. . . . Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state.

Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 256 (1938). The intangible evidencing such a receipt likewise is part of interstate commerce.

In finding that Florida's tax is not integrally related to interstate commerce, the Florida court focused upon certain narrow, intrastate activities surrounding the creation of the intangibles. The argument that a state could focus solely upon a single intrastate activity and evade the Commerce Clause's application was rejected in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981). Today, the Commerce Clause may be implicated if the local activity involves goods which may eventually enter into interstate commerce. *See also D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988). Given the multiple interstate activities which create a basis for taxation under Florida's taxing scheme, there can be no doubt that Florida's intangible tax reaches interstate activity with a significant impact.

II. THE INTERNAL CONSISTENCY TEST MUST BE APPLIED IN EVALUATING FLORIDA'S INTANGIBLE PERSONAL PROPERTY TAX.

If other states adopted Florida's taxing scheme, taxpayers engaged in interstate commerce would be subject to taxation of their intangibles in their states of domicile, in the state in which the sale generating the intangible actually occurs, and in the state where the property is delivered. Because of this multiple taxation of the same intangible, taxpayers which only engage in intrastate commerce will be provided a clear economic advantage over those engaged in interstate commerce in violation of

the Commerce Clause. Indeed, this Court recently held that tax schemes which permit multiple jurisdictions to tax the same discrete event without apportionment are violative of the internal consistency test. *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987).

In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), this Court declared that interstate commerce must bear its fair share and that such commerce would no longer be immune from state taxation. A four-prong test was developed which required that an activity subject to tax have a substantial nexus to the taxing state, that the tax be fairly apportioned, that the tax not discriminate against interstate commerce, and that the tax be fairly related to the services provided. *Id.* at 279.

In *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), the Court, applying *Complete Auto* to California's corporate unitary taxing scheme, articulated the "internal consistency" requirement that a state's taxing scheme be "fair." By fair, the Court stated "the formula must be such that, if applied by every other jurisdiction, it would result in no more than all of the unitary business' income being taxed." *Id.* at 169. Florida's system is not "fair." It has no apportionment.[3]

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[3] Florida does have the option of defining a different tax base for intangibles. This includes taxing only the intangibles of Florida domiciled companies or only the intangibles resulting from Florida sales. Florida's taxing scheme could be based on numerous discrete activities which would only subject intangibles to taxation in one state. However, the tax base defined by the taxing statute at issue in this case requires apportionment.

In *Container Corporation*, the state had imposed a franchise tax tied to the income of multistate enterprises. As there was but a single unit of income to be taxed, this Court utilized the internal consistency test in an analysis which resulted in the state tax being found valid. Such is the nature of the Florida scheme. A single unit of value, the intangible, will be subjected to tax by multiple jurisdictions. The Florida scheme on its face reaches out of Florida into the interstate arena and subjects commerce (the intangibles) to an unapportioned tax "regardless of where [the intangibles] are kept, approved . . . or paid." Fla. Stat. § 199.112(1). The statute specifically provides, that it is to, "apply to any person representing business interests in the State that may claim a domicile elsewhere." Fla. Stat. § 199.112(1). This tax is substantially more than a single local property tax, and the internal consistency test must be applied.

Subsequent to *Container Corporation*, this Court has maintained the vitality of the internal consistency test in evaluating income, excise, and flat-rate taxes. There appears to be no disagreement that a multistate enterprise subject to an income tax is entitled to an apportionment of the unitary value ("the income") to arrive at an appropriate allocation of the value to the respective taxing jurisdictions. *Container Corporation, supra*. The members of this Court, however, have not been unanimous as to the application of the internal consistency test in other than the income tax context. *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232, 254 (1987) (O'Conner, J., concurring; Scalia, J., joined by the Chief Justice, concurring in part and dissenting in part); *American Trucking Associations v. Scheiner*, 483 U.S. 266,

298 (1987) (O'Connor, J., joined by the Chief Justice and Powell, J., dissenting; Scalia, J., joined by the Chief Justice, dissenting).

Because they argue there is no unitary figure or event to apportion when a tax is based on a discrete event which can occur in one or more jurisdictions, not all members of this Court have agreed to apply the internal consistency test to state taxes which are based on an event which can occur in either a single state or in different states. *Tyler Pipe*, 483 U.S. at 256. The factual situations with which the dissenting opinions in *Tyler Pipe* and *American Trucking* are concerned are not present in this case.

The Florida intangible tax is not imposed as the result of a discrete event which can occur in a single state or in multiple states. Rather, the Florida intangible tax is imposed on a unit value as a result of various discrete events, and while these events can individually occur only in one state at a particular moment in time, different individual events can occur simultaneously. Thus, Florida's taxing scheme results in the taxing of a unitary value by multiple jurisdictions. In application, therefore, Florida's system of taxing intangibles is like that of an income tax.

Under Florida's taxing scheme, two states would not impose a tax on the same intangible as a result of the *same* discrete event occurring in each of their specific jurisdictions. They would impose it because of different events. This would be similar to an income tax being imposed by multiple states as a result of the taxpayer's activities exclusive to that state. Under Florida's intangible tax, just

like an income tax, each state would claim 100% of the value of the intangible as subject to its tax as a result of an event occurring in that state and only in that state. For example, assume that three states adopt Florida's taxing scheme. A taxpayer can have only one domicile, and the state where a taxpayer is domiciled would impose the tax on 100% of the intangible. The state where the sale occurs would tax 100% of the intangible, and there is only one such state. The state where the property is delivered would also impose the tax at 100% of the value of the intangible, and obviously the property can be delivered in only one state.

If each of these events exists in separate states, each state would impose the tax on 100% of the intangible. Just as with an income tax, the separate activities exclusive to the state give rise to that state taxing the value as a whole. If the internal consistency test is validly applied in an income tax context, it likewise must be applied in analyzing Florida's taxing scheme. Because the taxation of income and Florida's taxation of intangibles can result from discrete events in different states triggering a tax of a unit value, the two circumstances have an identical effect on interstate commerce. The internal consistency test must be applied in evaluating the constitutionality of Florida's intangible tax system. Even if the test is not categorically applicable to all "property taxes," *per se*, it must be applied to schemes like Florida's.

In support of its conclusion that the internal consistency test does not apply to property taxes, the Florida court cites *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980) and *Pullman's Palace Car Co. v. Commonwealth of Pa.*, 141 U.S. 18 (1891). *Ford Motor Credit*, 537

So.2d at 1013. Although these cases do contain certain distinctions between property taxation and excise and income taxation, these distinctions were not made in a context which would support the proposition that the internal consistency test is not part of modern day Commerce Clause analysis or is not applicable to property taxes.

In *Mobil Oil*, the contention was rejected that there was something talismanic about the taxation of intangibles that immunized dividends from the application of *Complete Auto* and its apportionment prong. Noting that the theories of taxation by apportionment and taxation by allocation to a single situs are theoretically incommensurate, the Court stated that the theory of taxing property by allocation to a single situs no longer applies when the taxpayer's activities involve relations with more than one state. *Id.* at 445, *citing Curry v. McCanless*, 307 U.S. 357 (1939). This Court approved that state's apportioned tax upon dividends and limited the commercial domicile's right to exclusively tax the intangibles when benefits and privileges are conferred by many states. *Id.* at 445-46.

Contrary to the Florida court's holding, the principle to be gleaned from *Mobil Oil* is not that differences continue to exist between property and other forms of taxation, but rather that, absent exceptional circumstances, taxation of property involved in interstate commerce is to be by apportionment, rather than by allocation to a single situs. In *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434 (1979), this Court noted that, prior to *Complete Auto*, the theory of property taxation was through allocation of the full value to the domicile of the owner, but this theory is

no longer used and property involved in interstate commerce is now to be taxed according to the rule of fair apportionment and nondiscrimination. 441 U.S. at 442.

In *Pullman's Palace*, the other case cited by the Florida court for declining to apply the internal consistency test, this Court characterized a tax on the capital of a nondomiciled railroad corporation as a tax on the corporate property within the taxing state and upheld the tax because the tax was fairly apportioned. *Pullman* represents an early precursor to the proposition that an intangible tax such as a tax on a corporation's capital stock must be apportioned if the property by which the tax is measured is a part of interstate commerce. The Court in *Pullman* recognized that, under an apportionment formula, if other states imposed a similar taxing system, only the full measure of value would be taxed and no more. 141 U.S. at 617-18. This cannot be said of Florida's scheme. This Court in *Pullman* measured the statute's validity by reference to its internal consistency. So, too, Florida's system's validity must be measured by its internal consistency.

In support of its conclusion that the internal consistency test has no application to a property tax case, the Florida court also cites the dissenting opinions by Justice O'Conner and Justice Scalia in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), and Justice Scalia in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987). These dissenting opinions, however, object generally to this Court's use of the internal consistency test in a circumstance other than one in which a taxing statute results in multiple jurisdictions validly seeking to impose tax on a single unitary

value or an event necessitating apportionment. Contrary to the Florida court's conclusion, the existence of these dissenting opinions emphasizes the determination of this Court's majority to follow the internal consistency doctrine when analyzing Commerce Clause challenges to state taxes.[4]

The Florida court erroneously relies on a due process analysis in reaching its conclusion that Florida's taxing scheme does not discriminate against interstate commerce. In support of its due process analysis, the Florida court cites to *State Tax Commission of Utah v. Aldrich*, 316 U.S. 174 (1942) and *Curry v. McCanless*, 307 U.S. 357 (1939). While admitting that those cases involve only due process challenges, the Florida court found little reason to doubt their application since a tax which will "satisfy the due process clause generally will satisfy the commerce clause." 537 So.2d at 1012.

Contrary to the Florida court's holding, the Commerce and the Due Process Clauses are not synonymous, and a tax which satisfies the Due Process Clause does not *per se* satisfy all the elements of the Commerce Clause. *See, e.g., International Harv. Co. v. Dep't of Treasury*, 322 U.S. 340, 352-62 (1944) (Rutledge, J., concurring). Specifically, the apportionment and discrimination prongs of *Complete Auto* must also be satisfied. *See Goldberg v. Sweet*, 488 U.S. 252 (1989). *Curry* and *Aldrich* involve, at most, nexus and benefit issues, the first and fourth prongs of the *Complete Auto* test. To the extent those cases involve

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[4] It must be emphasized that the circumstance objected to by the dissents are not present in the Florida scheme. *See* pp. 12-14, *supra*.

apportionment and discriminatory issues, they have been superseded by *Complete Auto.*

Since this Court articulated the internal consistency test, it has consistently held that the internal consistency test is an integral part of any Commerce Clause analysis under *Complete Auto. See Goldberg v. Sweet; D.H. Holmes Co., Ltd. v. McNamara,* 486 U.S. 24 (1988); *American Trucking Associations, Inc. v. Scheiner; Tyler Pipe Industries, Inc. v. Washington Department of Revenue; Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984). This Court has never indicated an intention to limit application of the internal consistency test in evaluating the constitutionality of an ad valorem tax system. There is no basis for the Florida court's conclusion that internal consistency does not apply to a Commerce Clause analysis of an intangible tax such as Florida's. To the contrary, the multiple activities on which the tax is predicated necessitate the tax be subjected to review under the internal consistency test. This is especially true where multiple jurisdictions will be imposing a tax on a single unit of value, the intangible.

This Court has previously termed its decisions on state tax measures a "quagmire" of judicial responses, in which the case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States' Portland Cement Co. v. Minnesota,* 358 U.S. 450, 457 (1959); *see also American Trucking Associations; Boston Stock Exch. v. State Tax Comm'n.,* 429 U.S. 318 (1977). The internal consistency test sweeps clear this confusion. It applies a rational, objective test for examining the constitutionality of a state tax to ensure that taxpayers who engage only in intrastate

commerce will not be provided an economic advantage over those engaged in interstate commerce.[5] Proof of actual multiple taxation is not required in applying the internal consistency test. *Goldberg,* 488 U.S. at ___, 109 S.Ct. at 589; *Tyler Pipe,* 483 U.S. at 246. Rather, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other states have passed an identical statute. *Goldberg,* 109 S.Ct. at 589. Thus, each tax must stand or fall on its own provisions. *American Trucking Associations,* 483 U.S. at 289. As *Armco* noted, no longer does the constitutionality of a state tax depend upon the shifting complexities of the other states and the particular states in which the taxpayer operates. Under the internal consistency test, certainty is enhanced for both taxpayers and states.

The need to review the internal consistency of a tax scheme is as applicable to Florida's intangible tax as it was to "the multiple activities exemption" in *Tyler Pipe* and *Armco, Inc.* A multiple activities exemption such as the one addressed in *Tyler Pipe* burdens interstate commerce in the same manner as a tax on intangibles which result from multiple activities. Although Florida has not designed its taxing scheme through the creation of exemptions, it has reached the same result by imposing one tax on tangibles and by basing this tax on characteristics of the intangible which are created by multiple activities. The result is that the various individual activities

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[5] Although apportionment had long been required for state taxes, that requirement has assumed greater significance following *Complete Auto's* holding that interstate commerce must bear its fair share.

which cause the unit value of an intangible to be subjected to tax under Florida's taxing scheme can occur in multiple states at the same time. Thus, the same burdens faced by taxpayers in *Tyler Pipe* and *Armco* are faced by taxpayers in Florida. The fact that a tax is described as an intangible tax should not change the constitutional standard by which the system is to be measured and the same standard applied in *Armco* and *Tyler Pipe* should be applied here.

The economic reality of Florida's tax is that it does not impose a tax on property located exclusively in Florida, but on gross receipts which are financed and which are derived from Florida sales by nondomiciled taxpayers or from Florida and non-Florida sales made by Florida domiciled taxpayers. This Court has stated that the analysis of a state tax should be based on the economic substance of the tax. *Complete Auto,* 430 U.S. at 288. The Florida tax is even more egregious than the taxes at issue in *Armco* and *Tyler Pipe* because the Florida tax is an annual value based tax and the intangible may be taxed repeatedly by multiple jurisdictions until paid in full. When viewed under the internal consistency test, it is clear that Florida's tax "exerts an inexorable hydraulic on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *American Trucking Associations,* 483 U.S. at 286-87.

The Florida court's decision is in conflict with existing decisions of this Court by failing to apply *Complete Auto, Container Corporation,* and their progeny. Florida has carved out an exception to the Commerce Clause in violation of this Court's previous holdings. This requires

this Court to resolve, once again, "the limits that the Commerce Clause places on the taxing power of the states." *Boston Stock Exch. v. State Tax Comm'n.,* 429 U.S. 318, 329 (1977).

CONCLUSION

The decision of the District Court of Appeal of Florida, First District, should be reversed.

Respectfully submitted,

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